No. 86-98

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY L. RIVERA

Appellant,

v.

JEAN MARIE MINNICH

Appellee.

On Appeal from the Supreme Court of Pennsylvania

BRIEF AMICUS CURIAE OF THE STATE OF OREGON IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

Amicus State of Oregon has filiation procedures similar in some respects to those of Pennsylvania. For purposes of this case, most important among those procedures is Oregon's requirement, like Pennsylvania's, that paternity be established by a preponderance of the evidence. Or. Rev. Stat. § 109.155(2) (1985). Oregon appears in this case in order to defend the balance struck by its state legislature, a balance which accommodates the interests at stake in a way that is both fair and constitutional.

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SUMMARY OF ARGUMENT

Contrary to appellant's argument, the Due Process Clause does not mandate a "clear and convincing" standard of proof in filiation proceedings. Appellant's argument rests in large part on the assertion that filiation is "simply the reverse" of termination of parental rights for constitutional purposes. This attempted equation is flawed because the interests involved in the two types of proceedings are fundamentally different. Appellant's asserted interests all reduce to economics: he seeks to avoid the financial burden the mother seeks to impose. The mother's interest in obtaining financial assistance in caring for her child is similarly economic in nature. The child's interest, like the mother's, is in obtaining support from the father. Thus, in a filiation proceeding, the interests on both sides of the litigation are financial. They therefore are of equal constitutional significance, and any justification for a heightened standard of proof evaporates.

The mandate for placing a greater burden on one party stems from the recognition that the other party has a constitutionally protected interest of greater import at stake. For example, in a criminal trial or involuntary mental commitment proceeding, the defendant's physical liberty is at stake. In a termination proceeding the parents' familial liberty is at risk. In these examples, the government acts in its sovereign capacity to withdraw or withhold liberty. An erroneous "deprivation" only occurs when the state prevails in a case it should lose. Due process mandates an elevated standard of proof in order to reduce the risk of an erroneous deprivation. The higher standard of proof does not reduce the risk of error in the factfinding process; it merely tilts the risk of error away from the individual. In order to provide the individual greater protection from erroneous government

interference with constitutional liberty, the government must bear a greater share of the risk of error.

Unlike criminal prosecutions, civil commitment proceedings or termination cases, a filiation proceeding such as the present case is not a unilateral attempt by the government to withdraw constitutional liberty. In a filiation proceeding individual interests are at stake on both sides of the litigation. The interests of the private litigants are of equal or approximately equal significance. An erroneous victory for either party necessarily results in an erroneous interference with the losing party's interests. To elevate the standard of proof in cases with competing individual interests of equal weight on each side of the proceeding would unjustifiably favor one party over the other. Rather than mandating an elevated standard of proof, due process might well mandate a standard that avoids such essentially arbitrary favoritism. At a minimum, states are not constitutionally foreclosed from providing dispute resolution mechanisms that treat the interests of all parties in a filiation proceeding equally and which evenly apportion the risk of error.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment commands that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court invoked the familiar three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976),[1] to conclude that, in parental rights termination proceedings, due process mandates the heightened "clear and convincing" standard of proof. Application of the *Mathews* test to filiation proceedings demonstrates that due process does not require and may prohibit imposition of this elevated standard.[2]

[1] [I]dentification of the specific dictates of due process generally requires consideraton of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

I. The Private Interests.

A. The putative father's interests are purely economic and do not implicate the familial rights at stake in *Santosky*.

Appellant's assertion that paternity proceedings are "simply the reverse of the termination of parental rights proceedings considered in *Santosky*," (App. Br. 12), is insupportable. Termination of parental rights works "a unique kind of deprivation." *Santosky*, *supra*, 455 U.S. at 759, quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). The "deprivation" that results from a finding of paternity does not implicate the constellation of constitutionally protected familial values at stake in terminations. Rather, the putative father's interests are purely economic.

This Court recently has noted the difference between the constitutional significance of a mere biological link and the greater weight given to a fully developed familial relationship. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court considered a challenge to a New York statutory scheme that permitted the adoption of illegitimate children without notice

[2] Our analysis is based on the situation presented by this and the majority of filiation proceedings, where the mother, either independently or with the assistance of the state, sues the putative father asserting that he is the father of her child. In addition to suits brought by the mother, however, Oregon law permits filiation proceedings to be filed, *inter alia*, by the child, or by a man claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock. Or. Rev. Stat. § 109.125(1) (1985)

to putative fathers who had not taken steps either to exercise parental rights or to accept parental responsibilities. The Court stressed the linkage between right and duty, and went on to emphasize the importance of love and emotional attachments in the creation of constitutionally protected familial rights. 463 U.S. at 257-61.

> The difference between the developed parent-child relationship that was implicated in *Stanley* [*v. Illinois*, 405 U.S. 645 (1972)] and *Caban* [*v. Mohammed*, 441 U.S. 380 (1979)], and the potential relationship involved in *Quilloin* [*v. Walcott*, 434 U.S. 246 (1978)] and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." . . . But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."

463 U.S. at 261 (citations and footnote omitted).

As the Court's statement suggests, fully developed familial relationships involving the assumption of parental duties and mutual love and affection are entitled to a significantly greater level of due process protection than the inchoate relationship at issue in this case. Appellant's assertion that his interests are equal to those of a parent facing termination is, thus, incorrect as a general proposition. His more specific propositions are no more persuasive.

Despite his attempts to suggest that he has a multiplicity of interests at stake (App. Br. 7-10), the putative father's

constitutionally cognizable interest in a paternity proceeding is limited to property: his funds will be chargeable for the child's benefit. It is undoubtedly true that the support obligation that will flow from an adjudication of paternity, including provision of medical care, wage garnishment, et cetera, can be substantial. The same, of course, may be said for the judgment following a determination of negligence in an ordinary tort action. The magnitude of the financial liability simply does not govern the standard of proof.

Appellant also asserts that the child may have rights against his estate through the laws of intestacy. In Oregon, as in all states except Louisiana, a parent may avoid this possibility by the simple expedient of writing a will and expressly disinheriting any child. *See Sieben v. Richards*, 8 Or. App. 487, 494 P.2d 253 (1972); *see generally* J. Dukeminier and S. Johanson FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 555-56 (1972) (in all states except Louisiana there is no statutory protection against disinheritance). The appellant is attempting to increase the weight of his property interest by suggesting that he is entitled to constitutional protection against his own future lack of planning.

Appellant also relies on the potential deprivation of liberty that could result from imprisonment for non-payment of his support obligation. (App. Br. 8-9). That interest is derivative only: it only arises in the event that the father-elect fails without cause to meet his economic obligations. In Oregon, as in Pennsylvania, *see* 23 Pa. Cons. Stat. Ann. § 4345 (1986), an adjudication of contempt requires wilful disobediance of a court order. *See State ex rel. Oregon State Bar v. Wright*, 280 Or. 713, 573 P.2d 294 (1977). Similarly, criminal non-support requires refusal or neglect to support "without lawful excuse." Or. Rev. Stat. § 163.555(1) (1985). Financial inability to pay support that is not of a defendant's own

making is a lawful excuse. *See State v. Timmons*, 75 Or. App. 678, 706 P.2d 1018, *rev. denied*, 300 Or. 451, 712 P.2d 110 (1985). Thus, the possibility of incarceration is real only if appellant defies the court's order without justification. His future irresponsibility, and its legitimate consequences, should not be a valid reason for granting him enhanced constitutional protection.

B. The mother's interests are entitled to the same level of constitutional protection as the father's.

The plaintiff-mother's interests, like the putative father's, are primarily economic. She seeks financial assistance in caring for her child. That assistance can take the form of monthly support payments, medical insurance and such other support as state law may provide.[3]

Even in those cases where the state brings the filiation proceeding on the mother's behalf for the purposes of recouping public assistance paid to the child, the mother's interest remains substantial. The average time that a mother receives Aid to Dependent Children is brief, leaving the father-elect as a direct resource to the mother and child for many years.[4]

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[3] Or. Rev. Stat. § 109.155(4) (1985) provides that after a determination of paternity:

> The court shall have the power to order either parent to pay such sum as it deems appropriate for the past and future support and maintenance of the child during its minority and while the child is attending school and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, and reasonable attorney fees at trial and on appeal.

Or. Rev. Stat. § 109.010 (1985) provides, in pertinent part:

> Parents are bound to maintain their children who are poor and unable to work to maintain themselves . . . .

[4] Studies conducted for the Department of Health and Human Services confirm that the average family receives Aid to Dependent Children for less than two years. *See* Oberheu, Howard, "Time On Assistance," H.H.S. Staff

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The mother's interest is, in effect, the mirror image of the father's. Every dollar that he contributes to the cost of child raising is a dollar not otherwise available to the mother or child. The father's liberty is at risk if he fails to support the child to the extent of his capability because he may be found to be in contempt or guilty of criminal non-support; but so, too, is the mother's liberty at risk, for she also is subject to the statutory obligation to support the child. A finding of paternity is final and may not be relitigated; but so, too, by operation of *res judicata*, is a finding of non-paternity.[5]

The plaintiff mother is in the same position as any other civil litigant: if the defendant is the biological father of her child she is entitled, as a matter of state law, to receive his contributory assistance in defraying the substantial economic costs of raising their child. Her rights are no less substantial than his and entitled to no less protection.

C. Raising the standard of proof increases the likelihood of an erroneous deprivation of the child's interest in gaining a source of support.

The child's primary interest is in obtaining support from the father. Children obviously are not well served by erroneous findings of non-paternity, which deprive them not

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Report, February, 1982, S.S.A. Publication No. 13-11979 (of 411,000 A.D.C. families whose grants were opened January through March of 1976, only 41.7 percent continuously received benefits through March 1977); Bane and Ellwood, "The Dynamics of Dependence: The Routes to Self-Sufficiency," published by Urban Systems Research and Engineering, Inc., under H.H.S. contract No. HHS-100-82-0038, June 1983 (of 676 A.D.C. families who received grants of at least $250 per month and were followed from 1968 through 1979, one-half received A.D.C. less than two years, two-thirds were off A.D.C. within four years and only seventeen percent remained on assistance for eight years.)

[5] *See Fox v. Hohenshelt*, 19 Or. App. 617, 528 P.2d 1376 (1974) (filiation proceedings are suits in equity); and *Wagner v. Savage, as Adm'r*, 195 Or. 128, 147, 244 P.2d 161 (1952) (principles of *res judicata* apply to suits in equity).

only of support, but also of the opportunity to know their heritage. Arguably, an erroneous finding of paternity, while providing a source of support, may be undesirable to the child for psychological reasons. There is, however, no principled basis for contending that the child is better served by decreasing the risk of erroneous findings of paternity at the cost of increasing the risk of erroneous findings of non-paternity.[6]

Because a heightened standard of proof increases the risk of erroneous findings of non-paternity at the child's expense, consideration of the child's interests militates strongly against the clear and convincing standard.

II. The Risk of Error.

Two potential errors that might occur in any given judicial proceeding should be distinguished. The first is the risk of an erroneous decision; the second is the risk of an erroneous deprivation. An erroneous decision occurs whenever the fact-finding process fails. When an innocent defendant is convicted, when a guilty defendant goes free or when a meritorious defense is rejected by a jury, there is an erroneous decision. A mistake is made. *See In re Winship*, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring). In the due process context, however, an erroneous *deprivation* occurs only when an erroneous decision impairs a constitutionally protected interest in life, liberty or property.

In a termination of parental rights case, only one party, the parent, has a constitutionally protected interest at stake. *Santosky v. Kramer*, *supra*, 455 U.S. at 759-61, 765. The state, acting in its sovereign capacity, seeks to deprive the individual of that interest. Similarly, in a criminal prosecution, the only constitutionally protected interest at risk is the defendant's liberty. In both contexts, the state may

[6] In fact, it is reasonable to assert that the child is better served by an erroneous finding of paternity than an erroneous finding of non-paternity. The former at least provides a potential source of financial support.

have compelling reasons for acting, but the character of the proceeding is essentially unilateral. The government acts against an individual. An erroneous deprivation results only when an innocent defendant is convicted or a fit parent's rights are terminated. Acquittals of guilty defendants or failures to terminate the rights of unfit parents, on the other hand, although plainly "erroneous" decisions with undesirable social consequences, do not result in erroneous deprivations of interests protected by the Due Process Clause.

Because a criminal conviction or a parental rights termination works a unique and grievous form of deprivation to the defendant, due process mandates an elevated standard of proof. The state must assume a greater share of the risk of an *erroneous decision* in order to reduce the risk of an *erroneous deprivation*. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

However, when litigation involves competing private interests of equal or approximately equal weight, a higher standard of proof serves no useful constitutional purpose. Any advantage accorded to one party by changing the standard of proof necessarily imposes a corresponding disadvantage on the other party. For example, in a civi' action for money damages, a wrongful verdict for either private party results in the erroneous deprivation of the other party's property. Because the litigants' interests are of equal weight in the constitutional scales—both risk only property—the risk of error properly is distributed in a "roughly equal fashion." *Santosky v. Kramer*, *supra*, 455 U.S. at 755, quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979).[7]

[7] It is the nature of the interest, not its significance to the individual plaintiff or defendant, that is germane. Thus, the standard of proof will not vary because one civil defendant can and another cannot afford the financial consequences of losing. *See Santosky v. Kramer*, *supra*, 455 U.S. at 757 (standard of proof must be based on the generality of cases, not on case-by-case exceptions).

As discussed above, in a filiation proceeding a finding of paternity results in a deprivation of the putative father's property. A finding of non-paternity works a virtually identical deprivation of the mother and child's interest in receiving support. While elevating the standard of proof likely would reduce the number of instances in which a putative father erroneously would be found to be the father and hence reduce the risk of erroneous deprivations of the father's property, it would increase the number of instances in which the actual father would escape responsibility, thus increasing the risk of erroneous deprivations of the mother's interest in the receipt of support. Justice Harlan made our point:

> In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderence of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In re Winship, *supra*, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring).[8] *See also Santosky v. Kramer*, *supra*, 455 U.S.

[8] This discussion was described by Justice Harlan as a "corollary" of his

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785-791 (Rehnquist, J., dissenting).

In filiation proceedings the comparative social disutility of erroneous decisions is in relative equipoise. Because there is no rational basis for preferring the putative father's rights over those of the mother and child, a heightened burden of proof creates an unjustified inequality in the risk of error. Due process does not mandate inequality in the burden of proof in addition to the inequality the plaintiff-mother faces in her need to preponderate.[9]

III. The State's Interests.

In prior cases where this Court has considered standards of proof, government has been a direct adversary to an individual citizen whose constitutionally protected interests were at risk. In filiation cases the state either stands in the shoes of the mother, seeking to assert her property interest or, in cases brought directly by the mother, plays a more neutral role. In either situation, however, the state's chief interest lies in providing a fair mechanism for resolving disputes of fact in which interested individuals share equally in the risk of error.

Appellant asserts that the mother and the state have no interest in an erroneous determination of paternity. (App. Br. 13). This assertion incorrectly ignores the interest, shared by the mother, child and state, in avoiding incorrect findings of non-paternity—an interest that would be impaired by the elevated standard the appellant urges. While it would be

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often-cited statement that the function of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, *supra*, 397 U.S. at 370.

[9] It goes without saying that the risk of error in filiation proceedings is substantially reduced in comparison with termination cases by the nature of the evidence. As this Court noted in *Santosky*, the evidence relied on in terminations is imprecise and subjective. 455 U.S. at 762. In filiation proceedings, by contrast, blood test evidence is objective and highly reliable. *See Little v. Streater*, 452 U.S. 1, 6 *et seq.* (1981).

naive to suggest that many litigants do not desire an erroneous decision that works to their benefit, no one can assert a legitimate or constitutionally protected interest in an erroneous result. This is as true of private litigants, whatever the interest at stake, as it is of the state. Thus, it adds nothing to the analysis to assert that the state has no interest in an erroneous determination of paternity. The state has equally little interest in an erroneous determination of non-paternity. The putative father, also, cannot assert a legitimate interest in an erroneous verdict of non-paternity.

In *Santosky* the Court noted that it would be incorrect to presume at the factfinding stage of a parental termination case that the parents and the child are adversaries. The Court went on to state:

> [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

455 U.S. at 760-61 (footnote omitted).

It is not accurate to describe an elevated standard of proof as an "error-reducing" procedure. As discussed above, an elevated standard of proof does not reduce the risk of error, it merely shifts it from one side to the other. A heightened burden of proof, while decreasing erroneous determinations of paternity, inevitably would increase the number of erroneous determinations of non-paternity. The state's legitimate interest in providing a fair mechanism for resolving disputes can be realized only by an equal distribution of the risk of error. A preponderance standard best accomplishes that result. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

CONCLUSION

Application of the *Mathews v. Eldridge* criteria in light of all of the relevant private interests at stake demonstrates that

a clear and convincing standard does not decrease the overall risk of erroneous deprivation of those interests in filiation proceedings. Accordingly, the decision of the Supreme Court of Pennsylvania upholding the constitutionality of the preponderance standard of proof should be affirmed.

Respectfully submitted,

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